

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC FRONTIER FOUNDATION

1875 Connecticut Avenue NW

Suite 650

Washington, DC 20009,

Plaintiff,

v.

DEPARTMENT OF JUSTICE

950 Pennsylvania Avenue NW

Washington DC 20530,

Defendant.

C. A. No. _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiff seeks the expedited processing and release of records that Plaintiff requested from Defendant Department of Justice’s component, the Federal Bureau of Investigation, concerning Bureau’s misuse of National Security Letter authority, which was documented in a recent report from the Department of Justice Office of the Inspector General. There is no dispute that the requested records involve a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence” within the meaning of Defendant’s regulations, 28 C.F.R. § 16.5(d)(1)(iv). Therefore, Plaintiff is statutorily entitled to the expedited treatment it seeks.

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This

Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

3. Plaintiff Electronic Frontier Foundation (“EFF”) is a not-for-profit corporation established under the laws of the State of California, with offices in San Francisco, California and Washington, DC. EFF is a donor-supported membership organization that works to inform policymakers and the general public about civil liberties issues related to technology, and to act as a defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and disseminate information concerning the activities of federal agencies.

4. Defendant Department of Justice (“DOJ”) is a Department of the Executive Branch of the United States Government. DOJ is an “agency” within the meaning of 5 U.S.C. § 552(f). The Federal Bureau of Investigation (“FBI”) is a component within Defendant DOJ.

The FBI’s Abuse of National Security Letter Authority

5. The FBI has for many years possessed limited power in certain investigations to issue National Security Letters (“NSLs”), which are demands for customer account information and transactional records from third parties such as telephone companies, Internet service providers, financial institutions, and consumer credit agencies.

6. Signed into law shortly after the 9/11 terrorist attacks, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“PATRIOT Act”) substantially expanded the FBI’s preexisting legal authority to collect third-party records through NSLs.

7. In 2005, Congress held a series of hearings on legislation to reauthorize certain provisions of the PATRIOT Act, which were scheduled to sunset at the end of that year without further congressional action. *See* Pub. L. No. 107-56, §224, 18 U.S.C. § 2510 note. In testimony

at one hearing leading up to the passage of the legislation, the Attorney General stated that “[t]he track record established over the past three years has demonstrated the effectiveness of the safeguards of civil liberties put in place when the act was passed. There has not been one verified case of civil liberties abuse.”

8. The USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, directed the DOJ Inspector General to review “the effectiveness and use, including any improper or illegal use, of national security letters issued by the Department of Justice.”

9. Pursuant to this directive, the Inspector General publicly released a 126-page report on March 9, 2007, which found extensive misuse of NSL authority in a sample of four FBI field offices during calendar years 2003-2005.

Plaintiff’s FOIA Request and Request for Expedited Processing

10. By letter delivered by facsimile to the FBI and dated March 12, 2007, Plaintiff requested under the FOIA the following agency records (including, but not limited to, electronic records) from January 1, 2003 to the date of the request:

- A. All records discussing or reporting violations or potential violations of statutes, Attorney General guidelines, and internal FBI policies governing the use of NSLs, including, but not limited to:
 - i. Correspondence or communications between the FBI and the Privacy and Civil Liberties Oversight Board concerning violations or potential violations of statutes, Attorney General guidelines, and internal FBI policies governing the use of NSLs; and
 - ii. Correspondence or communications between the FBI and Department of Justice Office of the Inspector General concerning violations or potential violations of statutes, Attorney General guidelines, and internal FBI policies governing the use of NSLs;
- B. Guidelines, memoranda or communications addressing or discussing the integration of NSL data into the FBI’s Investigative Data Warehouse;
- C. Contracts between the FBI and three telephone companies (as referenced in page 88 of the Inspector General’s report), which were intended to allow the Counterterrorism

Division to obtain telephone toll billing data from the communications industry as expeditiously as possible;

- D. Any guidance, memoranda or communications discussing the FBI's legal authority to issue exigent letters to telecommunications companies, and the relationship between such exigent letters and the FBI's authority to issue NSLs under the Electronic Communications Privacy Act;
- E. Any guidance, memoranda or communications discussing the application of the Fourth Amendment to NSLs issued under the Electronic Communications Privacy Act;
- F. Any guidance, memoranda or communications interpreting "telephone toll billing information" in the context of the Electronic Communications Privacy Act;
- G. Any guidance, memoranda or communications discussing the meaning of "electronic communication" in the context of the Electronic Communications Privacy Act;
- H. Copies of sample or model exigent letters used by the FBI's Counterterrorism Division;
- I. Copies of sample or model NSL approval requests used by the FBI's Counterterrorism Division; and
- J. Records related to the Counterterrorism Division's Electronic Surveillance Operations and Sharing Unit (EOPS).

11. Also on March 12, 2007, Plaintiff delivered by facsimile to the DOJ's Director of Public Affairs a copy of EFF's FOIA request to the FBI, and formally requested that the processing of the request be expedited because it involves a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence" under 28 C.F.R. § 16.5(d)(1)(iv).

12. By letter dated March 29, 2007, the FBI acknowledged receipt of Plaintiff's FOIA request.

13. By letter dated March 30, 2007, the FBI informed Plaintiff that the Director of Public Affairs had granted Plaintiff's request for expedited processing.

14. Notwithstanding Defendant DOJ's purported decision to expedite the processing of Plaintiff's FOIA request, to date, the FBI has neither completed the processing of Plaintiff's

FOIA request nor informed Plaintiff of an anticipated date for the completion of the processing of the request.

15. Not only has the FBI failed to expedite the processing of Plaintiff's request, it has also exceeded the generally applicable twenty-day deadline for the processing of *any* FOIA request.

16. Plaintiff has exhausted the applicable administrative remedies.

17. Defendant DOJ has wrongfully withheld the requested records from Plaintiff.

CAUSE OF ACTION

Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records

18. Plaintiff repeats and realleges paragraphs 1-17.

19. The FBI has wrongfully withheld agency records requested by Plaintiff by failing to comply with the statutory time limit for the processing of FOIA requests.

20. Plaintiff has exhausted the applicable administrative remedies with respect to the FBI's wrongful withholding of the requested records.

21. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

A. order Defendant DOJ and its component to process immediately the requested records in their entirety;

B. order Defendant DOJ and its component, upon completion of such expedited processing, to disclose the requested records in their entirety and make copies available to Plaintiff;

- C. provide for expeditious proceedings in this action;
- D. award Plaintiff its costs and reasonable attorneys fees incurred in this action;
- and
- E. grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Marcia Hofmann

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